IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

APPEAL FROM ORDER No 32 of 2003

For Approval and Signature:

HON'BLE MR.JUSTICE K.A.PUJ

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

ANIL DINKAR SHETTY

Versus

MAHENDRAKUMAR NATWARLAL SHAH

Appearance:

1. Appeal from Order No. 32 of 2003

MS KJ BRAHMBHATT for Petitioner No. 1-3

MR AV PRAJAPATI for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE K.A.PUJ

Date of decision: 11/03/2004

ORAL JUDGEMENT

This Appeal From Order is filed against the order dated 06.08.2001 passed by the learned 6th Joint Civil Judge (S.D.), Surat below an application Exh.1 filed

under O. IX, Rule 13 of Code of Civil Procedure, for setting aside an ex-parte decree passed in Special Civil Suit No. 19 of 1995.

2. It is the case of the present appellants who are the original defendants in the suit that the present respondent - original plaintiff has filed Special Civil Suit No. 19/1995 against the present appellants for recovery of an amount of Rs. 1,04,244/-. The notice was duly served on the appellants and the present appellants have appeared through their advocate and asked for time to file written statement from time to time. The appellants, however, were not informed by their advocate about the progress of the suit and decree was passed ex-parte on 07.12.1999 whereby the present appellants were held jointly and severally liable to pay an amount of Rs. 1,04,244/- with interest at the rate of 18% p.a. from the date of the suit till its realisation.

3. The present appellants came to know about passing of this ex-parte decree on 23.12.1999 and immediately they moved an application on 24.12.1999 for restoration of Special Civil Suit No. 19/1995. The present respondent - original plaintiff has opposed the said application and strongly contended that the suit was filed in 1995 and decree was passed on 07.12.1999 i.e. after the period of four years and during this period, neither written statement was filed nor any evidence was led and hence, present respondent has filed an application under O. VIII R.10 for passing ex-parte decree and accordingly, ex-parte decree was passed. In this view of the matter, the application filed by the present appellant under O.IX R.13 should not be entertained and it should be dismissed.

4. The learned Trial Judge has considered the rival submissions of the parties and rejected the appellants' application vide his order dated 06.08.2001.

5. Ms. K.J. Brahmbhatt, learned advocate appearing for the appellants has submitted that the appellants were prevented by sufficient cause from filing the written statement before the Trial Court as they were not informed by their advocate and because of the default committed by their advocate, the appellants should not suffer. She has further submitted that the learned Trial Judge has not correctly appreciated that in all, three suits bearing Special Civil Suit Nos. 18, 19 & 20 of 1995 were filed by the present respondent and ex-parte decree came to be passed in all the three suits. Thereafter, restoration applications were filed in all

the three suits and other two suits were ordered to be restored whereas in the present case, the learned Trial Judge has rejected the restoration application only on the ground that the certified copy was not produced before the Trial Court and that it was not possible to ascertain as to whether the decree was passed ex-parte or as to whether the application moved by the appellants fell within the scope of O.IX, R.13 of C.P.C. A certified copy of the decree passed by the Trial Court is produced before this Court during the course of hearing wherein it is specifically mentioned that present appellants were not represented by any one and against them, the word "ex-parte" was mentioned. She has further submitted that this is a fit case where the learned Trial Judge should have allowed the restoration application and restored the suit to file and decide it on merits. Even on merits also, the suit is filed on the basis of Promissory Note and no documentary evidence was produced. In any view of the matter, a fair chance be given to the appellants so as to defend the suit by filing written statement as well as by leading proper evidence.

6. Mr. A.V. Prajapati, learned advocate appearing for the respondent - original plaintiff has strongly submitted that the suit is of 1995 and though the decree was passed in favour of the plaintiff in the year 1999, the plaintiff is not in a position to recover his legitimate dues. He has further submitted that neither the present appellants remained present nor they have filed their written statement and hence, on an application being moved by the plaintiff under O.VIII R.10, the decree was passed by the learned Trial Judge. He has further submitted that the Court has ample power to consider the application moved by the plaintiff and pass an appropriate order thereon. Even otherwise, since ex-parte decree was passed due to appellants' own fault, no useful purpose would be served even after restoring the suit to the file. He has lastly submitted that if the Court is of the view that the impugned order is required to be quashed and set aside, a strict condition must be imposed on the present appellants whereby they should be asked to deposit a substantial amount if not the full decretal amount before the Trial Court so as to justify the stand taken by them in the present Appeal from Order.

7. After having heard learned advocates appearing for the respective parties and after having gone through the order passed by the Trial Judge, I am of the view that the learned Trial Judge has rejected the restoration application filed by the present appellants under O.IX

R.13 of C.P.C. only on the ground that the certified copy was not produced. He has not given any other reason as to why the said application was not entertained. It is true that the suit was filed in 1995 and decree was passed in 1999 and during that period of four years, neither any written statement was filed nor any evidence was led by the defendants before the Trial Court. In that view of the matter, there may be some justification on the part of the Trial Court to pass such order. However, looking to the facts and circumstances of the case and having regard to equity and justice, it is desirable that parties to the proceedings should be given a fair opportunity of defending their case and in this view of the matter, the Court is inclined to entertain and allow this Appeal from Order only on the condition that the appellants would deposit a sum of Rs.25,000/before the Trial Court within a period of three weeks from the date of receipt of writ from this Court or from the date of receipt of certified copy of this order, whichever is earlier, and only thereafter, the Trial Court would take up the suit i.e. Special Civil Suit No. 19 of 1995 and decide the same as expeditiously as possible, preferably within a period of six months from the date of deposit of the amount by the present appellants. After the amount as directed above will be deposited by the appellants with the Trial Court, it is open for the respondent - original plaintiff to approach the Trial Court for withdrawal of the amount by filing an application and the Trial Court would decide the same in accordance with law. It is made clear that if the amount as directed above will not be deposited by the appellants within above time limit, the suit neither be restored nor be proceeded with.

8. With this direction, this Appeal from Order is allowed to the above extent. No order as to cost.

[K.A. PUJ, J.]

#Savariya#

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